No. 17-586

IN THE

Supreme Court of the United States

GREG ABBOTT, in his official capacity as Governor of Texas, *et al.*,
Appellants,

v.

SHANNON PEREZ, *et al.*,
Appellees.

On Appeal from the United States District Court for the Western District of Texas

BRIEF FOR APPELLEES (Congressional Districts)

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QUESTIONS PRESENTED

The district court found that two congressional districts ("CDs") created by the Texas Legislature in 2011, and subsequently retained by the Legislature in 2013, are legally infirm: CD35 as an unconstitutional racial gerrymander, and CD27 as an intentional and effective dilution of Latino voting rights under §2 of the Voting Rights Act and the Fourteenth Amendment.

1. Does the Court have jurisdiction under 28 U.S.C. § 1253 to hear the State's appeal prior to entry of injunctive relief?

2. Did the district court commit clear error in carefully considering the substantial factual record of racial predominance in the drawing of CD35, or in concluding no narrowly tailored or compelling justification supported such racial predominance?

3. Did the district court properly find that CD27 violates the Fourteenth Amendment and §2 of the Voting Rights Act by diluting Latino voting rights?

RULE 29.6 STATEMENT

The Mexican American Legislative Caucus, Texas House of Representatives ("MALC") is an official caucus of the Texas House of Representatives. MALC is also incorporated as a nonprofit, nonpartisan 501(c)(6) corporation titled Mexican American Legislative Policy Council. MALC has no parent corporation or publicly held company owning 10 percent or more of the corporation's stock.

The League of United Latin American Citizens ("LULAC") is a 501(c)(3) organization. LULAC has no parent company and issues no stock.

The Texas State Conference of NAACP Branches is a nongovernmental corporation. It has no parent corporations and no stock.

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INTRODUCTION

This appeal is not about a statewide congressional map called Plan C235. Nor is it about a "court-drawn" redistricting plan at all. Rather, this appeal is about two specific congressional districts, both drawn line-by-line and block-by-block by the Texas Legislature in 2011 in the exact configuration they maintain to this day. Whether the plan-wide label slapped onto the congressional map is C185 or C235, these two districts are the same, occupying the same territory and containing the same voters that the 2011 Legislature corralled into them.

In the State's telling, there was a brief, shining moment in 2013 when Texas history reversed course and the Texas Legislature fell all over itself to conform state conduct to a federal court's provisional observations. The district court rightly saw through the 2013 masquerade.

By and large, the days are long past when racially invidious policies are openly declared. Instead they are couched in pretext, and the only way to unmask pretext is to pull back the curtain and see what facts lie behind it. This task—distinguishing appearance from reality—is assigned to district courts, charged with sorting through the purported facts and witness testimony to ferret out unlawful racial classifications and racial discrimination.

The State and its new United States ally are opportunistically inconsistent in their treatment of appearance versus reality. In asking this Court to review this premature appeal, they argue that regardless of the outward appearance of the lower court's

ruling, this Court should look beyond the words and give it a "practical" reading to find it has jurisdiction. Their emphasis on the practical effects of government action, however, falls away in their substantive argument. There they argue that the Court must proceed formalistically and take at face value whatever the State purveys as justification for its redistricting actions. This Court, they contend, must accept the Legislature's ritualistic 2013 ratification of the district court's plainly provisional interim map order as a slate-wiping exercise and not as what the district court saw it to be: an effort to throw up a smokescreen to obscure the motives underlying the 2011 legislative redistricting plan as to two congressional districts left entirely unaltered by the 2013 bill.

The State further insists that this Court accept its formalistic accounting method for creating minority opportunity districts, that, if accepted at face value, gives the technical appearance of compliance with the Voting Rights Act and masks the practical reality—and practical effect—of a legislative attempt to undermine the Act. Much as the Legislature used a demographic "nudge factor" to paint a false picture of the 2011 version of CD23 as a minority opportunity district when it was specifically micro-designed to achieve the opposite result, the State argues that its drawing of CD35 was tailored to comply with its obligations under §2, when the reality, unearthed by the district court, was that CD35 was designed to achieve a double-whammy: eliminate a preexisting crossover district where minority voters' rights were already protected and trade away the voting rights of nearly a quarter million Latinos in Nueces County two hundred miles away by stranding them in a new district where they are submerged in a sea of Anglo bloc voting.

Appellees lay out the facts below in significant detail because, in a case like this where appearance is pitted against reality, the facts are all the more important.

STATEMENT

At the center of this appeal are two Texas congressional districts in the statewide map labeled Plan C235: CDs 27 and 35. The district court found constitutional and statutory violations in the two districts but has not yet determined an appropriate remedy. The State, now joined by the United States, seeks pre-remedy reinstatement of the districts.

CDs 27 and 35 are creatures of the 2011 Legislature. Sections 27 and 35 of Article II of the 2011 congressional redistricting bill establish the two districts and specify their census geography. Act of June 20, 2011, 82nd Leg., 1st C.S., ch. 1, 2011 Tex. Gen. Laws 5091-5180. When the Legislature amended the bill in 2013, it bypassed these two sections altogether, leaving CDs 27 and 35 in the "exact same configuration" since 2011. C.J.S. App. 113a.[1]

A. In *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006) ("*LULAC v. Perry*"), the Court invalidated Texas Congressional District 23 as a violation of §2 of the Voting Rights Act, 52 U.S.C. § 10301. On remand, the district court remedied the violation, adjusting the boundaries of five Texas congressional districts. 457 F. Supp. 2d 716 (E.D. Tex. 2006). The court's changes were incorporated into a

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[1] "C.J.S. App." refers to the appendix to the Jurisdictional Statement in Case No. 17-586. "Supp. App." refers to the supplemental appendix (containing the findings of fact) to the Motion to Dismiss or Affirm in Case No. 17-586. "J.A." refers to the Joint Appendix.

statewide map called Plan C100 (the "benchmark" plan). It contained six Latino opportunity districts in the region of the state with the heaviest concentration of Latino voters.[2] This is the large swath of South and West Texas radiating in a fan south- and southwestward from Travis County—but not including it—that is referred to in this litigation as the South and West Texas "envelope." 457 F. Supp. 2d at 720; Supp. App. 428a.[3] The benchmark plan remained in effect through 2010.

Benchmark CD27 ran south along the Texas Gulf Coast, from Nueces County in the north to Cameron County on the Mexican border. It had been in this southern orientation—and had been a Latino opportunity district under §2—since 1982. Supp. App. 287a-88a, 299a. Until 2010, Nueces County Latinos had been electing their congressional candidates of choice for more than a quarter century. *Id.* 294a.

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[2] A minority opportunity district under §2 is one in which minority voters comprise a majority of eligible voters and have a reasonable opportunity to elect candidates of their choice. *See, e.g.*, *Johnson v. De Grandy*, 512 U.S. 997, 1014 n.11 (1994). As to terminology, this brief uses the term "Latino" instead of the term "Hispanic" often used in the proceedings below, but quotes and shorthand references, such as "HCVAP," derived from "Hispanic" are left in the form used below.

[3] The district court described the South and West Texas envelope as the "large triangular area contained by a line starting in Nueces County, running south to Cameron County, then along the Rio Grande River to El Paso County, then from El Paso County to Bexar County, then northeast to the Hays/Travis County line, and back to Nueces County." Supp. App. 298a. Travis County lies north of the envelope in Central Texas. There is a seventh Latino opportunity district in another part of the state—CD29 in Harris County—that is not at issue in this appeal.

Benchmark CD25 was anchored in Travis County (home to Austin) in Central Texas and ran southeast from there through less populated counties. Most of its population was in Travis County. Supp. App. 301a. It functioned as a "crossover district." *Id.* 340a, 428a; C.J.S. App. 175a-76a; Br. for State Appellants ("Br.") 47 n.12.

The last round of congressional elections conducted under Plan C100 in 2010 was a wave election for Republicans. Supp. App. 25a. One exception was in benchmark CD25, where the Anglo Democratic incumbent was reelected with the support of Latino and African-American voters. *Id.* 301a, 428a. But elsewhere, Democratic incumbents fared poorly, including in districts in South and West Texas where Latino voters who had an opportunity to elect candidates of their choice failed to do so in 2010. In benchmark CD27, an Anglo Republican, Blake Farenthold, won against the Latino candidate of choice, Democratic incumbent Solomon Ortiz, by a less than 1 percent margin. *Id.* 26a, 291a-92a. In benchmark CD23, a Latino opportunity district spread across West Texas from San Antonio to El Paso, the Latino-preferred Democratic incumbent also lost to a Republican challenger. *Id.* 25a.

B. Release of the 2010 decennial census showed that the state's population had increased by 4.2 million over the previous decade. Supp. App. 457a. Its population contained no racial or ethnic majority. Dkt. No. 277 at 22 (Stip. 76). The surge in population yielded Texas four new congressional seats. *Perry v. Perez*, 565 U.S. 388, 390 (2012).

This massive growth in population was disproportionately African-American, Latino, and Asian-American. Ninety percent of the statewide population

growth was attributable to minorities, with Latinos alone accounting for 65 percent of the growth. Supp. App. 16a, 457a. Minorities further accounted for 70 percent of the growth in citizen voting age population ("CVAP"). *Id.* 459a. The Anglo share of CVAP, meanwhile, declined in every benchmark district. *Id.* 460a.

In the South and West Texas envelope, Latinos accounted for almost all of the CVAP growth. Supp. App. 461a. All six of the benchmark plan's Latino opportunity districts in the envelope were overpopulated. *Id.* 430a-31a. Collectively, they were so overpopulated that enough population was left over to compose nearly three-quarters of a new ideal-size district. *Id.*

Travis County also had significant population growth but, in contrast to other major areas of the state, the pace of Anglo growth essentially equaled the pace of Latino growth. Supp. App. 460a-61a.

C. As the 2011 redistricting process began, Republicans held overwhelming majorities in the Texas Legislature and were "hostile to the creation of any minority districts." Supp. App. 38a, 476a. They and their redistricting leaders—Representative Solomons in the House and Senator Seliger in the Senate—equated minority opportunity districts with Democratic districts and therefore opposed creation of any new congressional district that would be dominated by voters of color unless they deemed it required by §2. *Id.* 438a, 476a.[4]

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[4] Solomons and Seliger, along with Solomons' chief mapdrawer Ryan Downtown, were "the primary persons responsible for drawing and making decisions about the congressional map." Supp. App. 431a.

The actual mapdrawing job fell to the House redistricting committee, chaired by Representative Solomons. Supp. App. 152a. Chairman Solomons, unfamiliar with redistricting law and Voting Rights Act requirements, appointed staffer Ryan Downton, also lacking in redistricting experience, the primary mapdrawer. *Id.* 44a, 46a, 152a.

Four foundational principles set the stage for the drawing of the new congressional plan. First, Downton, with Solomons' and Seliger's acquiescence, used an automatic numerical metric for deciding what constituted a minority opportunity district under §2. His "sole criterion" for determining the existence of such a district was whether its population was majority CVAP for a single minority, "even if it never elected the minority's candidate of choice." Supp. App. 437a. Thus, to classify a district as a Latino opportunity district, the Legislature's chief mapdrawer set a quota of 50 percent or more HCVAP, regardless of actual or anticipated election outcomes. *See, e.g., id.* 383a.

Second, the proposal to create a new minority opportunity district in the Dallas-Fort Worth ("DFW") area, Supp. App. 253a, 256a, was rejected as not required by §2. *Id.* 258a-59a, 260a, 286a.

Third, after the decision not to draw a new minority opportunity district in the DFW area, Solomons established a "3-1 rule" for the new districts. Regardless of population growth, only one of the four new seats would be a district favoring Democrats and, perforce, it would be a minority opportunity district. Supp. App. 286a, 435a. "Once Solomons was advised that only one new VRA district was required, Solomons would only consider a map that increased the net number of Republican districts by three." *Id.* 439a; *see also* C.J.S. App. 172a (objective was to create a 3-1 map that

"increased the number of Republican seats by three and Democrat seats by only one"); *id.* 220a n.73 (mapdrawers "adhere[d] to a 3-1 map policy").

Fourth, there was a political imperative to protect two Republican incumbents when drawing districts in the South and West Texas envelope. Those incumbents, Canseco and Farenthold, had won unexpected victories in 2010 in Latino opportunity districts (benchmark CDs 23 and 27, respectively) but neither was the Latino voters' candidate of choice. Supp. App. 25a-26a. The mapdrawers knew that these districts had to be reconfigured to protect the Republican incumbents, Supp. App. 151a, 293a, 342a; C.J.S. App. 143a, 191a-92a, 393a, and that the key to this was to draw in Anglo voters—and draw out Latino voters—in and near the envelope.[5]

D. Downton, the mapdrawer, was assigned the task of incorporating these four basic instructions into a statewide map. Specifically, he was to eschew any new district for minorities in the DFW area, use the bright-line 50 percent metric to measure what constitutes a minority opportunity district, allow a net gain of only

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[5] These problems were highlighted as redistricting strategizing got underway in late 2010 in two memos by Eric Opiela, the Republican congressional delegation's redistricting emissary to the Legislature and a regular confidante of Downton. Supp. App. 442a. The first memo, directed primarily at CD23, suggested the use of a "nudge factor" to protect Canseco by "nudging" high turnout Latino voters out of the district and swapping in low turnout Latino voters, increasing the total HCVAP of benchmark CD23 but lowering the likelihood the Latino-preferred candidate would win. *Id.* 27a-28a, 431a-32a. The second memo, issued a few days later, highlighted the "problems inherent in trying to protect both Farenthold and Canseco" and identified the need to find more "Anglo voters"—a term used four times in the short memo—somewhere in or near the envelope. *Id.* 29a.

one Democratic district (deemed synonymous with a minority opportunity district) in or near the South and West Texas envelope, and protect both Canseco and Farenthold's incumbencies by drawing new districts in which enough Anglos were added so they would win. His solution in drawing CDs 27 and 35—adopted by the 2011 Legislature, signed by the Governor, and left untouched ever since—is the one invalidated by the district court and now before this Court for review.

1. *DFW Area.* As set forth above, the proposal to create a minority opportunity district in the DFW area had been flatly rejected. Implementing this instruction, however, was no easy feat in light of the massive minority population growth in the area, which accounted for adding a new seat there, Supp. App. 286a. Using racial data, the mapdrawers sliced and diced the minority population to "decrease current and future minority voting strength," and district lines "pulled strangely-shaped minority population areas out of certain districts in order to submerge them in larger Anglo populations and to reduce minority voting strength." C.J.S. App. 400a; Supp. App. 286a.

2. *CD23.* In CD23, two of the basic instructions converged. Mapdrawers used the bright-line 50 percent HCVAP metric for what would be deemed a Latino opportunity district and, working within that framework, assiduously traded precincts in and out to implement the "nudge factor" concept to protect Canseco's incumbency. Working closely with others, Downton put the nudge factor to work, painstakingly identifying precincts with high Latino presence and low Latino turnout, and then artfully manipulating district lines to increase HCVAP percentage while excluding high turnout Latino precincts from the district. C.J.S. App.

106a, 145a; Supp. App. 391a.[6] The Legislature then assigned CD23 to the category of "Latino opportunity district," even though it was drawn for the specific purpose of ensuring that the Latino-preferred candidate would not win. C.J.S. App. 146a. In other words, borrowing from the 2003 legislative playbook, the Legislature reconfigured benchmark CD23 "to protect a Republican candidate who was not the Latino candidate of choice from the Latino voting majority in the district." *Id.* 144a; *see also id.* 147a-48a (CD23 reconfigured to "create the facade of a Latino opportunity district"). The district had been "nudged" from one that performed for Latino voters to one that would not.

Even with the putative Latino opportunity district in CD23, the Legislature knew that §2 would require one more Latino opportunity district in the South and West Texas envelope, for a total of seven. Supp. App. 435a; C.J.S. App. 176a, 392a.

3. *CD27 and Nueces County.* Nueces County (home to Corpus Christi) contains 206,000 Latinos, 133,370 of them citizens of voting age, and is overwhelmingly Latino in total population. Supp. App. 294a; JX-100.2. Benchmark CD27, which housed the entirety of Nueces County, was a Latino opportunity district that, as of 2011, was overpopulated by only 43,500 people. Supp. App. 293a. Voting in Nueces County is highly polarized along racial lines. *Id.* 300a; C.J.S. App. 183a, 185a.

The mapdrawers knew that the obvious solution to the §2 problem the State faced in the South and West Texas envelope was to leave Nueces County, or most of it, in the envelope and in its long-time southward

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[6] The district court found Downton's denials of the cohesion and turnout manipulation "not credible." C.J.S. App. 146a n.20.

orientation. Supp. App. 297a. As the district court explained: "Including the population of Nueces County in the envelope makes it easier to draw seven Latino opportunity districts under §2," without extending beyond the envelope into Travis County. *Id.* 300a.

Instead, however, Downton removed Nueces County entirely from the South and West Texas districts and drew it into a district oriented northward, out of the envelope. Supp. App. 293a, 298a-99a; *see* J.A. 450a.[7]



[7] The geographic details, down to street level, of individual districts in Plan C235 are available online at the public Texas Redistricting website maintained by the Texas Legislative Council. *See* District Viewer interactive map: Plan C235, http://www.tlc.state.tx.us/redist/districts/congress.html.

While mapdrawers and legislators understood that they could have protected Farenthold in a northward-oriented district while at the same time retaining most of Nueces County—and nearly all of its Latinos—in an opportunity district oriented southward, Supp. App. 297a, they deliberately chose not do so, *id.* 299a-300a.

The "primary and dominant motive" driving this decision "was to place the incumbent Farenthold, who lived in Nueces County and would likely be ousted by the existing Latino majority, into an Anglo-majority district (and thus to take away the opportunity to elect that Nueces County Latinos had enjoyed)." C.J.S. App. 191a. The method chosen to effectuate this purpose was to strand all Nueces County Latinos—nearly a quarter of a million of them—in a new majority-Anglo CD27 where they have "no opportunity" to elect candidates of their choice. *Id.* 190a; Supp. App. 294a-96a, 433a.

To ensure that the purposeful elimination of benchmark CD27 as a Latino opportunity district would not result in one less such district in the envelope, Downton and the Legislature substituted a new CD34—a Latino opportunity district—running north along the Gulf coast from Cameron County on the Mexican border south of Nueces County. Supp. App. 299a. Having satisfied their objective of protecting Farenthold by drawing Nueces County Latinos out of the envelope, the mapdrawers set to the task of creating the §2-mandated seventh Latino opportunity district.

4. *CD35, Benchmark CD25, and Travis County.* For their new Latino opportunity district, Downton and the Legislature looked to Travis County. To be sure, the Legislature had "no reasonable basis" for concluding that a §2 Latino opportunity district should

be drawn in the county. Supp. App. 340a, 342a. Nor was it necessary to draw any of Travis County into a new Latino opportunity district in order to reach the objective of adding one in the South and West Texas envelope. *Id.* 340a, 440a.[8] But the Legislature did it anyway. It used race as a tool not to comply with §2, but to obtain political advantage by creating the "facade of complying with § 2 while actually minimizing the number of districts in which minorities could elect their candidates of choice despite the massive minority population growth that had occurred throughout the state." C.J.S. App. 178a; *see also id.* 110a (putting Travis County population into CD35 "use[d] race as a tool for partisan goals").

Under the benchmark plan, Travis County already anchored benchmark CD25, the crossover district where, with Anglo crossover support, Latinos and African Americans were able to elect their congressional candidate of choice. Supp. App. 306a. And, in stark contrast to the burgeoning Latino growth in the South and West Texas envelope, which had the most concentrated HCVAP increase in the State, *id.* 461a, Travis County was not an area where Latino growth hugely outpaced other growth. C.J.S. App. 169a.

Even more importantly, Travis County is the only locale in the state with legally insignificant levels of racially polarized voting as a whole. C.J.S. App. 175a. "Anglo voters do not show high levels of cohesion and do not vote as a bloc against the minority-preferred candidates." Supp. App. 340a. In short, Travis County

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[8] Downton "did not think CD35 was necessary for § 5 compliance, and he was not sure if it was required by § 2." C.J.S. App. 178a-79a n.45. He did not have "any evidence . . . to support the inclusion of Travis County in the new § 2 district when he decided to place the district there." *Id.*

is the notable exception to the pattern of racially polarized voting that pervades Texas. C.J.S. App. 21a.

Despite these facts, the mapdrawers deliberately dismantled benchmark CD25 by drawing the state's only new Latino opportunity district, CD35, into Travis County. C.J.S. App. 110a (CD35 placement was to "intentionally destroy" benchmark CD25). The new plan divided Travis County, and its more than one million residents, into five congressional districts, none anchored in the county. Supp. App. 333a.



The mechanism used to draw CD35 so as to destroy CD25, moreover, was race. Downton testified that he purposely selected Anglo Democrats in the county and separated them into different districts. Supp. App. 318a. He turned on the software's block-level racial shading function to search out Latinos in Travis County. *Id.* 337a-38a. Using this capability, he reached into north central Austin with a narrow "squiggle" that had no other purpose than to grab an area that was 90-100

percent Latino. *Id.* 318a; C.J.S. App. 167a. He divided a Catholic university precinct to carve its Latino-dominated dorms into CD35. C.J.S. App. 167a. He disregarded state House district lines, and carved those areas into several congressional pieces, because the House lines did not mesh with his racial line-drawing objective. Supp. App. 320a. Analysis of the Travis County divisions show that race was twice as likely as party vote to predict whether a voting precinct ended up in CD35. *Id.* 337a. "The higher percent Hispanic a VTD, the more likely it was included in CD35, and the higher percent Anglo a VTD, the less likely it was included in CD35." *Id.*[9] Congressional district lines in the county did not align "with any recognizable communities other than race." *Id.* 320a. The net effect of the mapdrawers' race-based configuration of CD35 in Travis County was to *reduce* by 63,000 the number of Travis County Latino voters with the opportunity to elect their candidates of choice. *Id.* 336a.

The southern end of CD35, in south San Antonio, was equally race-based in its design. C.J.S. App. 169a. The district runs south out of Travis County in a 3-mile wide strip along Interstate 35 for fifty miles, then funnels through a narrow neck in northeastern Bexar County because the area contains low concentrations of Latinos. *Id.* 414a; Supp. App. 318a. The district then widens to include a large concentration of Latinos on the south side of San Antonio.

As the district court concluded, CD35 was also the least compact of all of the districts drawn in 2011. Supp. App. 339a. It retained this distinction in Plan

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[9] The expert analysis by Dr. Ansolabehere in his 2014 report is the underpinning for these court findings. *See* J.A. 494a-97a.

C235, where it remained exactly as it has been since drawn in 2011. JX-100.10.

In short, as the district court found, it is "clear" that race predominated in drawing CD35. C.J.S. App. 170a; *see also id.* 166a. This finding "applies to the district as a whole." *Id.* 170a n.36.

E. The 2011 regular legislative session ended without enactment of a congressional plan, but on that same day the Governor called a special session to begin immediately. Supp. App. 154a. The Legislature passed its 2011 congressional redistricting bill 24 days later, labeling it Plan C185, and the Governor signed it in mid-July. *Id.* 228a-29a. Because §5 of the Voting Rights Act was still operative at the time, the State filed suit in federal court in the District of Columbia seeking preclearance of its plan. *Id.* 229a.

Lawsuits challenging the enacted congressional and state House plans under §2 and the Equal Protection Clause also were filed in federal district courts in Texas. Ultimately, nine separate plaintiff groups were joined in one consolidated case before the three-judge district court in San Antonio.[10]

The San Antonio court held initial hearings regarding the congressional and House plans in September 2011. But by late October, the district court in the D.C. preclearance lawsuit had not yet ruled, and it became increasingly clear that the San Antonio court would have to craft interim plans for the upcoming elections. The court was forced to modify parts of the election

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[10] The United States joined the plaintiffs in challenging the 2011 plan but did not challenge the 2013 plan. One of the United States' claims was that CD27 constituted intentional vote dilution in violation of §2 and the Constitution. U.S. Post-Trial Br., Dkt. No. 1279 at 26-28 (Oct. 30, 2014).

schedule but held onto the scheduled March primary date. In late November 2011, it ordered an interim plan for congressional elections, Dkt. No. 544, but the State appealed to this Court and, two weeks later, obtained a stay of the plan's implementation. Soon after, the district court again adjusted election deadlines and moved the primary election to early April. Dkt. No. 563 at 7.

On January 20, 2012, in *Perry v. Perez*, this Court vacated the district court's interim plan order and remanded the case for the district court to develop an interim plan under the new standards it had announced. The district court promptly vacated its order for an early April primary and gave the parties only fourteen days to submit "agreed-upon interim maps." Dkt. No. 583.

A subset of plaintiffs negotiated a compromise with the State on an interim map and presented it to the court. C.J.S. App. 6a.[11] The compromise plan's principal changes were centered on the DFW area and CD23. It included no changes whatsoever to CDs 27 and 35.

The State admitted the compromise plan was "far from perfect," but still supported it as "adequate for [its] intended purpose," which was to allow the already-delayed 2012 primary elections to finally proceed. Dkt. No. 605 at 4. According to the State, "in the

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[11] In addition to the State, the main proponents of the compromise plan were the Task Force plaintiff group and Congressman Cuellar. Defendants' Advisory Regarding Interim Redistricting Plans, Dkt. No. 605 at 3 (Feb. 6, 2012).

short term" Texas voters would be better served. *Id.* at 20.[12]

Barely a month after *Perry*'s remand, in the midst of numerous election delays, and over objections from most plaintiffs, the court "accept[ed] the compromise plan." C.J.S. App. 368a. After modifying it for purely technical reasons, the court issued Plan C235 as the interim plan for the 2012 elections. CDs 27 and 35 remained exactly the same as the State drew them in 2011. *Id.* 113a.

The court expressly warned the parties that the "compromise plan" was by no means a "final ruling on the merits of any claims," and reflects only "preliminary determinations" that "may be revised upon full analysis." C.J.S. App. 367a-68a. In allowing CD35 to remain unchanged "at this time," *id.* 415a, the court reiterated that whether it was a racial gerrymander was a "close call," *id.* 409a. The court was equally wary of its preliminary ruling on CD27, noting that the §2 challenges were "not without merit" and that its ruling allowing CD27's interim use was only effective "at this time." *Id.* 419a. In short, Texas was fully on notice that the "preliminary" conclusions about Plan C235 were not the court's final word on the constitutional and §2

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[12] The State reiterated this view of the interim plan to this Court. After one plaintiff group petitioned for a stay of the interim plan order, the State successfully opposed the stay primarily on the ground of short-term necessity. *LULAC v. Texas*, No. 12A234. "The interim maps were *designed to provide an interim solution* for the upcoming elections. . . and need to be used for the purpose for which they were designed." Opposition to Application for Emergency Stay 3 (Sept. 12, 2012) (emphasis added). According to the State, "[t]he whole point of drawing interim maps was to . . . have certainty about the shape of their districts for the upcoming election process." *Id.* at 10.

claims, particularly with respect to CDs 27 and 35. *Id.* 6a (quoting 2012 interim order).

Several months later, in late August 2012, the D.C. court denied preclearance, unanimously concluding that Plan C185, including CDs 27 and 35, "was enacted with a discriminatory purpose." *Texas v. United States*, 887 F. Supp.2d 133, 159 (D.D.C. 2012), *vacated on other grounds*, 570 U.S. 928 (2013). Pointedly, the court explained that "[t]he parties have provided more evidence of discriminatory intent than we have space, or need, to address here," *id.* at 161 n.32, and that it was "persuaded by the totality of the evidence that the plan was enacted with discriminatory intent," *id.* at 161. The court further determined that Texas had violated §5 by dismantling the Travis County-anchored benchmark CD25, which was home to a "tri-ethnic crossover coalition" where minority voters had had an opportunity to elect their congressional candidate of choice. *Id.* at 184, 190. Texas appealed.

F. In 2013, while the preclearance appeal was pending with this Court, the Governor called a special legislative session—on one day's notice—for the express purpose of repealing Plan C185 and adopting Plan C235. Supp. App. 231a; C.J.S. App. 40a. This was only two years after Plan C185's enactment; legislative leadership was the same and so were 75 percent of the legislators. C.J.S. App. 38a n.37; Dkt. No. 1442, Stips. 1-4 (June 28, 2017). The Legislature effectively amended Plan C185 by adopting the changes made in Plan C235. Half of Plan C185's districts, including CDs 27 and 35, were left in place.[13]

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[13] The census block assignments in ten districts, including CD35, are the same in Plans C185 and C235. Another eight

The district court found that "[t]he Legislature did not adopt the Court's plans with the intent to adopt legally compliant plans free from discriminatory taint, but as part of a litigation strategy." C.J.S. App. 40a.[14] That litigation strategy was to evade the same findings of discriminatory intent in the San Antonio court that had already been made by the D.C. court, and to claim protection from the district court's preliminary approval of the interim plan to insulate the State from further liability. By adopting the interim plan, "however flawed," the State sought to "prevent Plaintiffs from obtaining relief for purposeful racial discrimination." *Id.* 44a.

The district court's express warnings about the limitations of its 2012 interim plan did not go unnoticed by the Legislature's own attorney. *See* J.A. 437a-48a. In public testimony, he meticulously walked the legislators through the court's caveats and their implications for the legislative action under consideration. The Legislature, he explained, could not rely on the district court's 2012 interim plan order as proof the plan complied with the Voting Rights Act or Constitution. The district court, he said, had been "in a little bit [of a] tricky [position] because [it] had not made full determinations, . . . had not made fact findings on every issue, had not thoroughly analyzed all the evidence but they had to make some best-case guesses." C.J.S. App. 43a (citation omitted).

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districts, including CD27, are assigned the same populated census blocks in both plans. Dkt. No. 1442, Stips. 7-8.

[14] This unanimous finding was based in part upon documents previously withheld by the State but ordered released in the middle of trial, and upon the district court's assessment of the trial testimony of Rep. Drew Darby—a redistricting committee chairman for the 2013 special session. C.J.S. App. 44a-45a n.45.

"[W]illfully ignor[ing] those who pointed out deficiencies," C.J.S. App. 45a n.45, including its own attorney, on June 24, 2013, the Legislature ratified Plan C235, including the 2011 versions of CDs 27 and 35.

G. The district court subsequently conducted two week-long trials, first on Plan C185 in 2014, then on Plan C235 in 2017. In both, the issues as to CDs 27 and 35 remained the same, because the "exact same configuration of CD35 and CD27 remains in Plan C235" as in Plan C185. C.J.S. App. 113a. The district court's March 2017 ruling on Plan C185 established that intentional discrimination infected the 2011 redistricting plan, describing the intentional fracturing of communities of color and race-based line drawing across the state. *See, e.g.*, *id.* 289a (in the DFW area "race was used as a proxy for political affiliation . . . intentionally to dilute minority voting strength"); *id.* 148a-49a (mapdrawers' "intentional[] targeting [of] Hispanic voter turnout and cohesion" in CD23 "bears the mark of intentional discrimination").

The court's August 2017 ruling on Plan C235 effectively upheld the interim map's compromise changes to CD23 and the DFW-area districts. But the court found differently for CDs 27 and 35. It sustained the challenges leveled against these districts since the case's beginning in 2011. It explained that the Legislature could have complied with its §2 obligation to draw seven Latino opportunity districts in the South and West Texas envelope without extending into Travis County by retaining Nueces County in the envelope districts. Supp. App. 300a. In finding that the legislature's "offset" Latino opportunity district, CD35, was an unconstitutional racial gerrymander, the court found that CD35's location "was not to address § 2 concerns, but to intentionally destroy an existing

district [benchmark CD25] with significant minority population." C.J.S. App. 110a.[15]

The court struck down CD35 as a racial gerrymander in both plans. *See* C.J.S. App. 115a ("Although Plan C235 was enacted in 2013, the decision as to which voters to include within CD35 was made in 2011, and that remains the proper time for evaluating the district[.]"). The court found that the core African-American community in Austin was divided from historical communities of interest and "effectively neutered" by grouping it with a distant metropolitan area with which it did not share interests. Supp. App. 335a. It concluded that "race subordinated other redistricting principles" in Travis County, *id.* 339a, 342a, where minority populations were "fractured" and Latino voters carved out for inclusion in a new majority-minority district without any Voting Rights Act justification because Anglo bloc voting in opposition to minority voter preferences is absent, *id.* 334a, 340a.

As to CD27, the court found that it had been converted from a Latino opportunity district into one where "Latino voters have no opportunity to elect their preferred candidates." C.J.S. App. 190a. The effect was to dilute the voting strength of the more than 200,000 Nueces County Latinos stranded in the district. *Id.* 191a. And the choice was purposeful, made "to protect an incumbent who was not the candidate of choice of

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[15] The court incorporated the findings of fact and opinion that issued with its Plan C185 ruling a few months earlier into the Plan C235 ruling, and the original dissenting panel member agreed that the opinion and those findings constitute the law of the case. C.J.S. App. 14a n.13. The district court was unanimous in its new factual findings regarding the purpose of the 2013 Legislature's litigation strategy.

those Latino voters." *Id.* 190a. After the Plan C235 trial, the court found that this discriminatory intent "carr[ied] over" to the 2013 adoption of identical district lines, "purposefully . . . depriv[ing] plaintiffs of any remedy." *Id.* 46a, 116a.

H. The district court explained at the end of its Plan C235 ruling that its previous bifurcation of the case into separate liability and remedial phases meant that its ruling was only addressing the legal violations in C235. C.J.S. App. 119a. It gave the Legislature an opportunity to remedy those violations found in the ruling. This was hardly the first time it had issued such an invitation. Four months earlier, after it had issued its Plan C185 ruling, the court indicated that the State should be prepared to discuss whether the Legislature—then sitting in regular session—"intends to take up redistricting . . . to remedy any [C185 violations] that persist in the 2013 plans" at an upcoming hearing. Dkt. No. 1352. This request was met with legislative silence. The court again invited the Legislature to act following this Court's decision in *Cooper v. Harris*, 137 S. Ct. 1455 (2017), *see* Dkt. No. 1395, but the Legislature again declined.

At a scheduling hearing for the C235 trial, the State's attorney told the court that October 1, 2017, was a fixed date for any remedial plan to be in place. Hr'g Tr. 66 (Apr. 2, 2017). Thus, when it issued the C235 ruling, the court knew that the state-declared deadline was only a month and a half away. Even though the State had turned a deaf ear to its earlier inquiries about a legislative remedy, the court once again invited a legislative solution, asking the State to advise within three business days—by August 18—whether a special session would be called to consider remedying the violations. C.J.S. App. 118a. Absent

such notification, the court indicated that it intended to hold a remedy hearing on September 5. *Id.*

Upon the State's petition, this Court stayed further proceedings.

SUMMARY OF ARGUMENT

Texas appeals from an order that found two legal violations in a redistricting map. The order enjoined nothing. Nor did it provide a remedy for the violations it found. Whether and when to issue an injunction and what remedy was needed for the two legal violations were deferred so the court could hold hearings where those matters could be addressed. This Court lacks jurisdiction over an appeal of this sort.

If the Court decides that it has jurisdiction, then it will be reviewing the constitutional and statutory validity of two specific districts, CDs 27 and 35, in a statewide congressional map labeled Plan C235. Both districts were in the same place with the same people in the earlier statewide map labeled Plan C185.

The Court's review of the two districts' validity is under the clearly erroneous standard set out in Rule 52(a) of the Federal Rules of Civil Procedure. The State cannot escape review under that standard by the ploy of using a perfunctory 2013 legislative "ratification" of an interim court map that did not even touch the two districts at issue on appeal. The State and the United States try to change the Court's focus by claiming that the plan is "court-drawn" and, hence, the State is owed judicial deference in having adopted it. But only half of the districts in the court's one-time-only plan were "court-drawn." The other half, including the two districts at issue here, were "legislatively-drawn" by the 2011 Texas Legislature. The 2013 gambit is nothing but a ruse.

The district court painstakingly reviewed the facts about the Legislature's formation of these districts, the reasons for their configuration, and the effects of their creation on minority voters. And what its exhaustive review of the evidence showed is that Texas's motivation for its design of CD35, and its choice of who was in and who was out of it, was overwhelmingly racial. Further, the State had no cognizable compelling interest in creating CD35. Travis County, the locus of the State's principal fine-tuning of the district, is the one major area of the State where racially polarized voting is legally insignificant. While the requirements of §2 of the Voting Rights Act may be the *raison d'etre* for a race-based district, those requirements are simply absent here. Indeed, far from having "good reasons" to believe that §2 compelled the race-based configuration of CD35 into Travis County, *Ala. Leg. Black Caucus v. Alabama*, 135 S. Ct. 1257, 1274 (2015), the Legislature was motivated by the undisputedly *bad* reason of "destroy[ing] [an] otherwise effective crossover district[]" where minorities already were electing their candidates of choice with the help of crossover Anglo voters, *Bartlett v. Strickland*, 556 U.S. 1, 24 (2009).

Section 2 further provides no refuge for the configuration of CD35 where the Legislature knew it had readily at hand an alternative place to draw a Latino opportunity district where §2 requirements were easily met. Unlike in Travis County, Nueces County is home to extensive racially polarized voting, and a southward running Latino opportunity district anchored in Nueces County would have satisfied the State's §2 obligation. But the State not only refused to take that ready route, it affirmatively worked to undo the rights of Latinos in that part of the state. And it succeeded in its objective. For no reason other than to advance the

election prospects of an Anglo incumbent, it drew a new district which by its very design would drown out the votes of the Latino voters who had §2 rights. In short, the State cynically eliminated the §2 rights of Latino voters in one part of the State and ostensibly assigned those rights to voters in another part of the State where §2 required no remedy. The intentional vote dilution of Nueces County Latinos in CD27 had its desired effect and therefore violates §2 from any angle.

ARGUMENT

I. THE COURT LACKS JURISDICTION OVER THIS APPEAL

This Court has no jurisdiction to entertain Texas's premature appeal because the district court has not ordered injunctive relief. Under 28 U.S.C. § 1253, appeals to this Court from three-judge district courts may only occur "from an order granting or denying . . . an interlocutory or permanent injunction." There has been no such injunction here, as made clear in both the order on appeal, *see* C.J.S. App. 119a, and the court's subsequent order denying Texas's motion for stay pending appeal, *see* Dkt. No. 1538 (Aug. 18, 2017) ("Although the Court found violations in Plan C235, *the Court has not enjoined its use for any upcoming elections*.") (emphasis added). Under the plain text of § 1253, this Court lacks jurisdiction.

The "practical effects" test used in *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981), to determine whether there had been the denial of an injunction for purposes of appealability under 28 U.S.C. § 1292 is inapposite here for at least three reasons. First, the State's argument not only finds no basis in the plain text of § 1253, it directly contradicts the plain

text of § 1292, which expressly excludes from its ambit instances "where a direct review may be had in the Supreme Court." Second, *grants* of injunctive relief and *denials* of injunctive relief are measured by different standards, the former requiring far more detail and precision. *See Gunn v. Univ. Comm. to End the War in Viet Nam*, 399 U.S. 383, 388 (1970) (citing Fed. R. Civ. P. 65(d)). Third, even if the two provisions were construed the same way, the liability ruling in the court below did not grant injunctive relief in any "practical" sense where the "practical effect" of what a remedy would entail, who it would affect, and when it would be implemented remain, to this day, unknown and unknowable.

To avoid repetition, the Appellees on this brief adopt by reference the arguments made in opposition to jurisdiction in Part I of the Appellees' brief on state legislative districts, *Abbott v. Perez*, Case No. 17-626.

II. THE 2013 LEGISLATIVE INACTION WITH RESPECT TO CDS 27 AND 35 DOES NOT SUPPLANT THE 2011 LEGISLATIVE RECORD FROM WHICH THOSE DISTRICTS DERIVED

The State's central argument is that "any threat of injury from the 2011 redistricting plans disappeared when the Legislature repealed them." Br. 44. With respect to CDs 27 and 35, this is transparently false. Where these two districts were first placed by the Legislature when it enacted them in 2011, and where they have remained untouched ever since, voters in those districts have continued to suffer from the unlawful intent that drove their configuration and the discriminatory effects that have persisted in every congressional election this decade.

A. In 2013, the Legislature did precisely nothing with respect to CDs 27 and 35. Instead, each and every census block that was pieced together to form CDs 27 and 35 in 2011 was left untouched. Each and every voter who was drawn into those districts in 2011 remained in those districts in 2013. In fact, the only official place to find a geographical definition of these districts is in the intricacies of the 2011 legislation. Act of June 20, 2011, 82nd Leg., 1st C.S., ch. 1, 2011 Tex. Gen. Laws 5091-5180.[16] The 2013 redistricting bill does not amend these districts in any fashion. Contrary to Appellants' contention, legislative inaction does not magically erase prior legislative intent. If anything, a legislature's ratification of previous actions is nothing more than adoption of them, along with their underlying intentions. CDs 27 and 35 did not undergo a rebirth in 2013, only a continuation.

As a practical matter, judicial sanction of the State's purported "make-over" here would invite legislatures to manufacture new legislative records for blatantly discriminatory laws. Under the State's logic, for instance, where a challenge to legislatively enacted districts culminates in a trial riddled with damning evidence of discriminatory intent, a legislature could simply erase the record by reconvening before a judicial ruling is entered and reenacting the same districts, this time citing a purported effort to "cleanse" the districts of their discriminatory origins, or even to "bring [the] existing litigation to an end," Br. 36. *See* C.J.S. App. 115a (under State's theory, "a Legislature could always insulate itself from a *Shaw*-type challenge simply by re-enacting its plan

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[16] As explained above, *supra* n.13, Plan C235 made an inconsequential change to CD27 by removing a few unpopulated census blocks.

and claiming that it made no decisions about who to include in the district at the time of re-enactment"). There can be little doubt that, in such circumstances, the Legislature would and should be unable to supplant the original legislative record with a newly manufactured record that results in purposeful reinstatement of the status quo.

As a legal matter, the fact that Plan C235 nominally repealed Plan C185 rather than amended it does not provide legislative cover for those districts that remained the same. In *Oneida County v. Oneida Indian Nation of New York State*, 470 U.S. 226 (1985), this Court held that a repeal in name only has no impact on the substantive provisions that remain the same.

> Although there is a formal repeal of the old by the new statute, still there never has been a moment of time since the passage of the [old] act . . . when these similar provisions have not been in force. Notwithstanding, therefore, this formal repeal, it is . . . entirely correct to say that the new act should be construed as a continuation of the old[.]

Id. at 246 n.18 (quoting *Bear Lake & River Waterworks & Irrigation Co. v. Garland*, 164 U.S. 1, 11-12 (1896)); *see also Posadas v. Nat'l City Bank of N.Y.*, 296 U.S. 497, 505 (1936). Technical canons of statutory construction only reinforce application of this principle to the statutory provisions at issue here. "[W]hen an existing statute is reenacted by a later statute in substantially the same terms, . . . [t]he unchanged provisions which are repeated in the new enactment are construed to have been continuously in force." 1A Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* ("*Sutherland on Statutory*

Construction") § 23:29 at 542-43 (7th ed. 2009). The nominal repeal of Plan C185 in 2013 is thus of no moment with respect to the legal analysis of those districts that have remained in effect since 2011.

In this situation, the district court properly relied on *Hunter v. Underwood*, 471 U.S. 222 (1985), to conclude that the portions of the 2011 plan the court found had been drawn with an impermissible motive "remain unlawful" if "those lines remain unchanged" in Plan C235 because the "discrimination continues to have its intended effect." C.J.S. App. 35a. Appellants' attempt to distinguish *Hunter*, *see* Br. 32; U.S. Br. 33, rests on the same flawed premise that the Legislature actually took action on CDs 27 and 35 in 2013—which it did not. *Hunter* was unequivocal on the constitutional rule that governs analysis of CDs 27 and 35 here: If the "original enactment was motivated by" invidious discriminatory intent "and the section continues to this day to have that effect," it violates equal protection under the test laid down in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). *Hunter*, 471 U.S. at 233.

This case is indistinguishable. At the beginning of the decade, Texas enacted a redistricting plan riddled with discriminatory intent. While judicial intervention mitigated some of the discriminatory effect flowing from that improper intent, acquiescing to that limited and preliminary judicial intervention by enacting Plan C235's changes to the DFW districts and CD23 does not erase the intent with which CDs 27 and 35 were enacted or do anything to ameliorate how that intent

continued to produce the same effect in those districts in 2013 and beyond.[17]

The State's insistence that any analysis of the districts as drawn in 2011 is moot thus strains credulity in light of the fact that CDs 27 and 35 have been "continuously in force" since 2011. *Sutherland on Statutory Construction* § 23:29 at 542-43. A challenged statute does not become moot just because it is voluntarily repealed (and reenacted, unchanged) in the middle of a lawsuit. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 288-89 n.10 (1982). Here, the Legislature not only left open the possibility that it *might* reenact the 2011 redistricting statute, it effectively *did* reenact—or more precisely, "ratify"—that statute with respect to the only districts at issue in this appeal. *See Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 (1993) ("There is no mere risk that Jacksonville will repeat its allegedly wrongful conduct; it has already done so."); *id.* at 662 n.3 (controversy is not mooted where a new statute is "sufficiently similar to the repealed [statute] that it is permissible to say that the challenged conduct continues").

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[17] Indeed, the State's contention that the reenactment of the identical configurations of CDs 27 and 35 in 2013 saved the districts from invalidity under the Constitution and Voting Rights Act is refuted by this Court's interpretation of the Voting Rights Act itself. In *Reno v. Bossier Parish School Board*, 520 U.S. 471 (1997), this Court was faced with an argument that the 1982 renewal of §5 changed a prior interpretation of the Act's reach. The Court rejected the argument on the ground that *not* amending the statute does not constitute a change in the way the statute should be interpreted. "Quite obviously, reenacting precisely the same language would be a strange way to make a change." *Id.* at 484 (quoting *Pierce v. Underwood*, 487 U.S. 552, 567 (1988)).

B. Nor can the State seek refuge in the district court's purported "blessing" of CDs 27 and 35 in its 2012 interim plan order. The State's defense is unprecedented, boiling down to this putative rule: a legislature that successfully masks its discriminatory motives during preliminary injunction proceedings can permanently erase a discriminatory legislative record by simply repealing and reenacting its law—shifting the responsibility for its creation from the legislature to the court.

Ample authority shows the opposite to be true. The Court only recently explained the characteristics of preliminary rulings in terms contradicting Texas's argument:

> Crafting a preliminary injunction is an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents. The purpose of such interim equitable relief is *not to conclusively determine the rights of the parties*, but to balance the equities as the litigation moves forward.

Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080, 2087 (2017) (emphasis added) (citations omitted). This echoes decades of precedent establishing that a preliminary injunction ruling has limited significance for the ultimate disposition of a claim.

> The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis

> of procedures that are less formal and evidence that is less complete than in a trial on the merits. A party thus is not required to prove his case in full at a preliminary injunction hearing, and the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits.

Univ. of Texas v. Camenisch, 451 U.S. 390, 395 (1981) (citations omitted); *see also Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 317 (1985) ("any conclusions reached at the preliminary injunction stage are subject to revision"). The State's gambit of claiming safe harbor in the district court's preliminary ruling "improperly equates 'likelihood of success' with 'success,' and . . . more important . . . ignores the significant procedural differences between preliminary and permanent injunctions." *Camenisch*, 451 U.S. at 394.

The State can hardly feign surprise that preliminary court rulings cannot be used to justify the reenactment of identical districts. Not only did the Legislature's own lawyer caution against this shell-game strategy for hiding the State's unconstitutional conduct in 2013, but also the district court expressly told Texas that its interim ruling was "not a final ruling on the merits of any claims asserted by the Plaintiffs in this case." C.J.S. App. 367a. The State had no basis to believe the §2 and constitutional issues had been fully addressed or finally resolved where the district court had cited a variety of "difficult and unsettled legal issues as well as numerous factual disputes" that were made all the more "difficult to determine" in light of the "necessarily expedited and

curtailed" time frame for analysis. *Id.* 367a-368a.[18] The district court's repeated caveats, moreover, that the interim plan was acceptable *only to the extent it was interim* provided the Legislature no excuse for avoiding a considered analysis of its own and cementing CDs 27 and 35 for the remainder of the decade.[19]

In short, the State's boast that it simply "took the court at its word," Br. 2, is an empty one. The district court's "word" to Texas was that the interim plan ruling contained only "preliminary determinations" for one election cycle that "may be revised upon full analysis." C.J.S. App. 367a-68a. The State paid no heed.

This Court should not sanction the State's gaming of the judicial process. The Legislature's inaction in 2013 with respect to CDs 27 and 35 left those district lines, and the circumstances of their origin, in full force and effect. Accordingly, the district court properly grounded its analysis of the districts in the 2011 redistricting process.[20]

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[18] Indeed, the only federal court that *had* carefully considered the legality of the original plan found rampant discriminatory intent planwide. *Texas v. United States*, 887 F. Supp. 2d at 159, 161 & n.32.

[19] *See, e.g.*, C.J.S. App. 417a ("*For purposes of an interim plan*, the Court concludes that C235 adequately addresses the claims relating to the Central Texas districts.") (emphasis added); *id.* 423a (deeming Plan C235 "an appropriate interim plan"); *id.* 368a ("accept[ing] the compromise plan" because it "would significantly benefit the voters, candidates, election administrators, counties, and political parties" for the 2012 elections).

[20] Even were the Court to determine that the proper focus of the questions of motive, intent, and purpose is the action of the 2013 Legislature instead of the 2011 Legislature, the district court unanimously found that the 2013 Legislature displayed the

III. CD35 HAS BEEN A RACIAL GERRYMANDER EVER SINCE IT WAS DRAWN IN 2011

The district court struck down CD35 as a racial gerrymander in violation of the Equal Protection Clause of the Fourteenth Amendment. In accordance with this Court's precedent, it found that race predominated over traditional districting principles in "the drawing of district lines and selection of district population" in CD35, C.J.S. App. 166a, which maintained the "exact same configuration" in Plans C185 and C235, *id.* 113a. The court further concluded that the Legislature's race-based redistricting of CD35 was not tailored to a compelling state interest; mapdrawers set out "not to substantially address the § 2 requirement, but to use race as a tool for partisan goals." *Id.* 110a. The district court's assessment of CD35 in accordance with the "two-step" racial gerrymandering inquiry "warrants significant deference on appeal to this Court." *Cooper*, 137 S. Ct. at 1464.[21]

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invidious intent and dominant motive necessary to invalidate CDs 27 and 35. Its findings are not clearly erroneous and should not be overturned by the Court. The Appellees on this brief adopt by reference the arguments made on this point in Part II.B of the Appellees' brief on state legislative districts, *Abbott v. Perez*, Case No. 17-626.

[21] The district court's racial gerrymandering finding did not hinge on the State's discriminatory intent. The district court correctly noted that "[d]iscriminatory purpose is not an element of a *Shaw*-type claim." C.J.S. App. 37a n.36 (referring to *Shaw v. Reno*, 509 U.S. 630 (1993)); *see also id.* 164a n.31 ("The harm flows from being 'personally . . . subjected to [a] racial classification,' not from vote dilution or intentional discrimination.") (quoting *Alabama*, 135 S. Ct. at 1265); *Covington v. North Carolina*, 316 F.R.D. 117, 124 n.1 (M.D.N.C. 2016) ("In reaching this conclusion [that race predominated], we make no finding

Texas does not even attempt an argument that race did not predominate in the actual line drawing of CD35 or that the district court's extensive factual findings on this score are clear error. For good reason: the evidence of racial predominance in the selection of population within and without CD35 is overwhelming.

The district court found that nearly every traditional districting principle in CD35 was subordinated to race. In Travis County, the lines were drawn in complete disregard of city boundaries, state House district boundaries, and "any other recognizable communities of interest other than race." C.J.S. App. 168a; Supp. App. 320. Race subordinated party vote—by a factor of two—in the shuffling of voting tabulation districts in the five new congressional districts tattooed onto Travis County. Supp. App. 337a. Precincts were split to lasso the heavily-Latino dorms of a local Catholic university into CD35, apart from the rest of the school, and to send an "arrowhead" extension into northern parts of Austin to bring Latino apartment renters into a district running along the interstate then looping into the south side of San Antonio eighty miles away. C.J.S. App. 167a; *see Bush v. Vera*, 517

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that the General Assembly acted in bad faith or with discriminatory intent in drawing the challenged districts[.]"), *aff'd*, 137 S. Ct. 2211 (2017). That analysis comports with this Court's articulation of the racial predominance standard as one which examines the use of race in the placement of voters in various districts. *Alabama*, 135 S. Ct. at 1271 ("[T]he 'predominance' question concerns which voters the legislature decides to choose, and specifically whether the legislature predominantly uses race as opposed to other, 'traditional' factors when doing so."); *see also Miller v. Johnson*, 515 U.S. 900, 916 (1995). It is the race-based placement of voters without a strong basis in evidence for doing so, rather than any intent to discriminate through vote dilution, that defines a *Shaw* claim.

U.S. 952, 970-71 (1996) ("split[] voter tabulation districts" provide "objective evidence" of racial predominance since "the districting software used by the State provided only racial data at the block-by-block level").

Nor were these deviations from traditional districting criteria limited to the north half of CD35. *See* C.J.S. App. 170a n.36 (district court's "finding that race predominated in the drawing of [CD35] applies to the district as a whole"). Race was similarly the basis for selecting voters in Bexar County, where, after snaking south along the interstate, CD35 first narrows in low-density Latino areas then widens to embrace the large Latino community in South San Antonio. *Id.* 169a. Along the way, county and small city boundaries gave way to race. Supp. App. 328a-29a; C.J.S. App. 170a. The end result of this race-based carving of voters from north central Austin to the south side of San Antonio is a district that remains the least compact congressional district in the state. Supp. App. 339a; *see also* C.J.S. App. 162a-63a.

Where, as here, race predominates, the burden shifts to the State to demonstrate that the district's configuration was narrowly tailored to a compelling government interest. *Cooper*, 137 S. Ct. at 1464. Based on all available evidence, the district court rightly concluded that Texas had not satisfied its strict scrutiny burden with respect to CD35. While Texas leaned on §2 of the Voting Rights Act to justify its race-based redistricting of CD35, the district court found not only that CD35 was not "actually . . . necessary" to avoid a §2 violation, *Alabama*, 135 S. Ct. at 1274, but also that the Legislature had "no reasonable basis" for believing it was, Supp. App. 340a.

The district court found—and Texas does not dispute—that "the third *Gingles* precondition is not present in a significant portion of the district," namely Travis County. C.J.S. App. 175a. *See Thornburg v. Gingles*, 478 U.S. 30, 51 (1986) (requiring as precondition for §2 liability that "the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate"). Unlike most other areas of Texas, "Travis County does not have Anglo bloc voting." C.J.S. App. 110a. Rather, Travis County Anglos lack cohesion and split their vote, Supp. App. 308a, and therefore "do not vote as a bloc against the minority-preferred candidates." *Id.* 340a. African-American and Latino voters in Travis County "have the ability to elect their preferred candidates precisely because Anglo voters vote at sufficiently high rates for minority-preferred candidates." *Id.* Without evidence that racial bloc voting compelled the extension of CD35 into Travis County, Texas's §2 justification falls flat.[22]

The district court further found that "mapdrawers *knew*" that the third *Gingles* precondition was not satisfied in Travis County. C.J.S. App. 110a (emphasis added). To be sure, "[t]here is no indication that [the mapdrawer] had any evidence, much less a strong basis in evidence, to support the inclusion of Travis County in the new §2 district when he decided to place

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[22] While the district court was "inclined to find that CD35 is not compact for §2 purposes," it deferred the issue since the third *Gingles* precondition was found lacking. C.J.S. App. 175a. Indeed, the mapdrawer himself believed that CD35 was "borderline" on the compactness scale and "had his doubts that the district was required by § 2," C.J.S. App. 162a, and the State's own experts testified that CD35 is "definitely not a compact district" and "not 'compelling from a Section 2 standpoint,'" *id.* 162a-63a & n.30.

a district there." *Id.* 179a n.46. Nor was there any evidence "that any member of the Legislature, including Chairmen Solomons and Seliger, had any basis in evidence for believing that CD35 was required by § 2 other than its HCVAP-majority status." *Id.*; *see also id.* (mapdrawer "repeatedly testified that his sole criteria for a § 2 district was whether it was above 50% HCVAP"); *id.* 178a ("There is no indication that mapdrawers or the Legislature drew CD35 in Travis County because they felt that Hispanic voters there had a § 2 right that needed a remedy."). The State cannot now seek refuge in §2 where its configuration of CD35 was not even informed by, let alone grounded in, an inquiry into §2 requirements. *See Shaw v. Hunt* ("*Shaw II*"), 517 U.S. 899, 908 n.4 (1996) ("To be a compelling interest, the State must show that the alleged objective was the legislature's 'actual purpose' for the discriminatory classification, and the legislature must have had a strong basis in evidence to support that justification before it implements the classification.") (citation omitted). The State's willful failure to examine even minimally the critical issue of racial bloc voting for purposes of assessing potential §2 liability falls far short of its strict scrutiny burden to establish narrow tailoring. *See Cooper*, 137 S. Ct. at 1472 (refusing to "approve a racial gerrymander whose necessity is supported by no evidence").

In fact, the district court found as a fact that the "actual purpose" of Texas's race-based drawing of CD35 was never based on a legislative belief that §2 required its configuration, but, rather, on the race-based carve-up of Travis County and dismantlem[illegible]t of the existing crossover district there.

> [T]hey drew CD35 as an HCVAP-majority district that extended into Travis County for

> the purpose of eliminating the existing district [CD25] in which minorities and Anglos together elected a Democratic candidate (and to unseat that candidate). In this way, they were able to create the facade of complying with § 2 while actually minimizing the number of districts in which minorities could elect their candidates of choice despite the massive minority population growth that had occurred throughout the state.

C.J.S. App. 178a; *see also id.* 110a. This finding is fully supported by the record. *See Cooper*, 137 S.Ct. at 1465 (district court's findings of fact "are subject to review only for clear error"). The Legislature decided in advance that any new minority opportunity district in Texas had to yield a net gain of three Republican seats. Supp. App. 439a. "Although [the mapdrawer] could have drawn a new central Texas Latino opportunity district without including Travis County or disrupting CD25, he chose this configuration to ensure a 3-1 map." C.J.S. App. 440a. Thus, the district court concluded, "[a]lthough a new Latino opportunity district was required in South and West Texas, . . . mapdrawers' placement of significant population from Travis County into CD35 was not to substantially address the §2 requirement, but to use race as a tool for partisan goals." *Id.* 110a.[23]

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[23] To be sure, the State has no compelling interest in achieving *racially invidious* objectives by purposely destroying a crossover district. Shortly before this decade's redistricting cycle, this Court admonished states against such constitutionally suspect conduct. *See Bartlett*, 556 U.S. at 24 (a showing that a state "intentionally drew district lines in order to destroy otherwise effective crossover districts" would "raise serious questions" under the Fourteenth Amendment). The district court discussed the constitutional problem with the deliberate destruction of the Travis County-based crossover district but refrained from directly ruling

The State's principal argument in defense of CD35's race-based configuration is that the district court's interim map did not alter it. Br. 45-46. But as set forth above, *supra* Part II, Texas's decision to maintain the status quo in CD35 by doing nothing at all in 2013 cannot replace the actual decisions made when the actual lines were drawn by the Legislature in 2011. *See also* C.J.S. App. 115a. The district court's 2012 preliminary inquiry, moreover, can hardly be the justification for the State's action where that inquiry shifted the strict scrutiny burden to Appellees. The court asked whether *Appellees* had "demonstrated a substantial likelihood that CD35 would fail a strict scrutiny analysis if strict scrutiny applies," *id.* 415a, not whether the State would meet its burden to satisfy strict scrutiny. Texas's glib contention that "[i]f the district court had 'good reasons' to believe that CD35 needed to be drawn as a minority-opportunity district to address potential VRA §2 claims, then surely the Legislature did too," Br. 48, improperly equates the district court's standard of review under *Perry* with the State's more exacting standard under strict scrutiny.[24]

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on the question because its finding that CD35 is a racial gerrymander would necessitate reconfiguring the area anyway. C.J.S. App. 111a n.83, 172a n.38. Nonetheless, the intentional destruction of benchmark CD25 under the *Bartlett* constitutional test offers an alternative basis for invalidating Plan C235's racial carve-up of Travis County.

[24] Even if the 2013 Legislature's motivations were relevant, the district court specifically warned the State *not* to rely on its "preliminary determinations." C.J.S. App. 367a. The abundant caveats accompanying the interim plan provided Texas no legal or factual basis, let alone a "strong basis in evidence," *Alabama*, 135 S. Ct. at 1274, to believe that §2 required CD35's configuration.

The State's only substantive argument on strict scrutiny is that §2 required the creation of seven Latino opportunity districts in south/west Texas. But while the Legislature "may have had a strong basis in evidence for believing" this undisputed fact, it "had no basis in evidence to believe that the *Gingles* preconditions were satisfied in Travis County such that a race-based majority-Hispanic district should be drawn there." C.J.S. App. 176a. The mere fact that §2 required the creation of seven Latino opportunity districts does not give the State license to "draw a majority-minority district anywhere," even where the *Gingles* preconditions are not present. *Shaw II*, 517 U.S. at 916. The inclusion of Travis County "would not address the professed interest of relieving the vote dilution, much less be narrowly tailored to accomplish the goal." *Id.* at 917.

As detailed above, the mapdrawers knew full well that seven majority-minority districts could be drawn in the region—in satisfaction of §2—without the race-based carving of Travis County and the destruction of benchmark CD25. C.J.S. App. 181a n.47. Like the district court, this Court should reject Texas's invitation to bless its drawing of any old race-based district in any old configuration in purported service of §2. The question before the Court is not whether the State had good reasons to believe that §2 required seven Latino opportunity districts in south/west Texas, "one of which was CD35," Br. 47, but rather whether the legislature had good reasons to believe "that the race-based calculus it employed in [CD35] was necessary to avoid violating" §2, *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 801 (2017); *see also Cooper*, 137 S. Ct. at 1469 ("race-based districting is narrowly tailored" to Voting Rights Act compliance "if a State

had 'good reasons' for thinking that the Act demanded such steps").

In its recent strict scrutiny analysis in *Cooper*, this Court rejected the State's proposed unconstrained approach to drawing majority-minority districts in purported service of §2. There this Court affirmed the lower court's finding that the State of North Carolina had no basis for revamping an existing crossover district in ostensible service to §2 requirements where evidence of the third *Gingles* precondition was lacking. 137 S. Ct. at 1470. Similarly here, the State had no reason to think that §2 required it to draw CD35 all the way into Travis County, where the Anglo population "did *not* 'vote[] sufficiently as a bloc' to thwart [minority] voters' preference," *id.* (quoting *Gingles*, 478 U.S. at 51), and dismantle the existing crossover district CD25. In short, "experience gave the State no reason to think" that §2 required Travis County Latinos to be drawn out of their preexisting crossover district and into a new majority-minority district. *Id.*

Indeed, just as North Carolina pursued a single-minded focus on achieving 50 percent minority VAP without reference to the third *Gingles* precondition, *see id.* at 1472, Texas mapdrawers pursued a single-minded focus on achieving 50 percent HCVAP in CD35 without regard to the presence of Anglo bloc voting, C.J.S. App. 179a n.45. The incidence of racial bloc voting in some areas of south/west Texas does not support the State's avowed need to extend CD35 into Travis County to avoid §2 liability. This Court has consistently rejected—and should once again reject—the misguided notion that because there is racial bloc voting somewhere, the State can draw a §2 remedy anywhere.

Texas cannot take advantage of either its procedural maneuvers or §2 to justify its race-based configuration of CD35. The voters of CD35 have cast ballots in this unconstitutional district in every election this decade. This Court should affirm the district court's invalidation of CD35 as an unconstitutional racial gerrymander.

IV. CD27 HAS ALWAYS BEEN AND STILL IS IN VIOLATION OF §2

The district court expressly found that "the Legislature violated §2 in *both result and intent*" in its configuration of CD27. C.J.S. App. 112a (emphasis added). The State provides no basis for overturning either finding. While the State points to other possible explanations for the Legislature's decision to excise Nueces County Latinos from the majority-minority district they enjoyed for over 25 years, it cannot escape the testimony from its own witnesses affirming the primary intent to protect the Anglo incumbent by drowning out the votes of Nueces County Latinos. The State's myopic focus on its creation of seven majority-minority districts in purported satisfaction of §2, moreover, falls away in the face of the unlawful racial gerrymander of CD35 and ignores this Court's well-established rule that a state cannot skirt the §2 rights of minority voters by substituting in a new opportunity district where §2 does not require it.

A. CD27 Intentionally Dilutes the Vote of Nueces County Latinos

The district court's findings lifted the veil from the State's defense of what it did to the nearly quarter million Latino voters in Nueces County. As detailed above, while voting in the county is highly racially polarized, Latinos there had had the opportunity for

more than a quarter century to elect their congressional candidates of choice. But the Legislature deliberately and cynically eliminated that ability, and intentionally diluted the votes of Nueces Latinos, by stranding them in the new Anglo-dominated district where they lost their voting rights opportunity. The evidence showed that this was by legislative design "to protect an incumbent who was not the candidate of choice of those Latino voters." C.J.S. 191a.

The court based its finding on a meticulous examination of the extensive trial evidence, including testimony from the mapdrawers themselves. *See* Supp. App. 287a-300a; C.J.S. App. 191a-92a. The mapdrawers were well aware that Representative Farenthold would likely not survive reelection in majority-Latino benchmark CD27, so they reoriented the district to pave the way to his victory and ensure defeat of the Latino-preferred candidate. In the Legislature's view, the long-acknowledged voting rights of Nueces County Latinos had to be sacrificed because they voted the wrong way. *See LULAC v. Perry*, 548 U.S. 399, 440 (2006) ("In essence the State took away the Latinos' opportunity because Latinos were about to exercise it. This bears the mark of intentional discrimination[.]").

The State does not even attempt to justify the Legislature's decision to carve out Nueces County Latinos from their previous majority-minority district in service of Farenthold's reelection. To be sure, this Court has already rejected the State of Texas's argument that vote dilution is an acceptable means of incumbency protection. *See LULAC v. Perry*, 548 U.S. at 440-41. Over a decade ago, Texas argued that the reason for excising Latino voters from CD23 was to protect the incumbent "from a constituency that was increasingly voting against him." *Id.* at 440. This

Court clarified that incumbency protection may not be pursued at all costs.

> If the justification for incumbency protection is to keep the constituency intact so the officeholder is accountable for promises made or broken, then the protection seems to accord with concern for the voters. If, on the other hand, incumbency protection means excluding some voters from the district simply because they are likely to vote against the officeholder, the change is to benefit the officeholder, not the voters. By purposely redrawing lines around those who opposed [the incumbent], the state legislature took the latter course. This policy, whatever its validity in the realm of politics, cannot justify the effect on Latino voters.

Id. at 441. Indeed, similar to *LULAC v. Perry*, the legislative policy here "becomes even more suspect," *id.*, when considered in light of the evidence that the State "replaced" CD27 with CD35 in purported satisfaction of §2 knowing full well that the contorted extension into Travis County had no §2 basis. *See supra* Part III; C.J.S. App. 178a ("In this way, they were able to create the facade of complying with §2 while actually minimizing the number of districts in which minorities could elect their candidates of choice despite the massive minority population growth that had occurred throughout the state."); *LULAC v. Perry*, 548 U.S. at 441 ("This use of race to create the facade of a Latino district also weighs in favor of appellants' claim.").

Notwithstanding the testimony from the mapdrawers, the State contends that the real motivation for including Nueces County in majority-Anglo CD27 was

"to keep Nueces County whole as the anchor of a congressional district" while establishing a new district anchored in Cameron County. Br. 51, 53.[25] In particular, the State points to "hearings held before the 2011 legislative session" as the source for the reorientation of Nueces County and the concomitant electoral isolation of its 206,000 Latino residents. Br. 51. But the district court pored over the abundant testimony from those hearings and found significant inconsistencies with both the State's proffered explanation and the resulting map. *See* Supp. App. 295a. Indeed, "no one suggested" that Nueces County should be grouped with the host of majority-Anglo counties to its north, *id.*, yet that is precisely the configuration the mapdrawers chose—and precisely the means of diluting the vote of Nueces County Latinos. C.J.S. App. 189a-190a.

The State's contention that it was driven by a desire for Nueces County to anchor a district is further belied by the actual configuration and performance of CD27. While Nueces County voters controlled the outcome of CD27 elections in the *benchmark* plan, *see* Supp.

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[25] The State's citation to *Personnel Administrator of Massachusetts v. Feeney* as the governing standard for discriminatory intent conveniently omits two important qualifiers. First, the *Feeney* test asks whether the government decision was "at least *in part* 'because of'" its adverse effects on an identifiable group. 442 U.S. 256, 279 (1979) (emphasis added). *Feeney* further notes that when the adverse consequences of the law at issue on an identifiable group—here, minority voters—are virtually inevitable, "a strong inference that the adverse effects were desired can reasonably be drawn." *Id.* at 279 n.25. Where the State equated minorities with Democrats, and then used the division of minority communities as the tool to harm Democrats, the inference is unavoidable that the adverse effects on minorities also were intended.

App. 296a ("In benchmark CD27, Nueces County's registered voters made up just over 50% of the total registered voters."); Rod. Ex. 955 (63.3 percent of votes cast in 2010 general election in benchmark CD27 were from Nueces County), Nueces County voters *lost* control of the election once the district was reoriented to include "twelve heavily Anglo Central Texas counties," Supp. App. 294a, 296a ("In new CD27, Nueces County voters are no longer the majority of registered voters in the district."); Rod. Ex. 956 (65.1 percent of votes cast in 2012 general election in CD27 were from outside Nueces County). Indeed, the mapdrawers "did no analysis to see whether Nueces County could control the election in the new CD27 and did not know if it could." Supp. App. 296a. The fact that mapdrawers managed to fail in meeting what the State now proffers as the main goal driving CD27 reveals the pretextual nature of that claim.[26]

The State's alternative explanation for the configuration of CD27 was thoroughly considered and ultimately rejected by the district court. C.J.S. App. 193a. Even if the State's argument found some support in the record, the State provides this Court no basis for finding "clear error." *See Cooper*, 137 S. Ct. at 1465 ("A finding that is 'plausible' in light of the full record—even if another is equally or more so—must govern.") (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 575

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[26] The State's contention that there were other ways "a nefarious mapdrawer" could have diluted the vote of Nueces County Latinos hardly exonerates it for choosing its preferred method of vote dilution. Br. 53. The dilution of minority voting strength "may be caused by the dispersal of [Latinos] into districts in which they constitute an ineffective minority of voters," as was done in CD27, "*or* from the concentration of [Latinos] into districts where they constitute an excessive majority." *Gingles*, 478 U.S. at 46 n.11 (emphasis added).

(1985)); *see also Anderson*, 470 U.S. at 573-74 ("If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."). This longstanding rule of deference is surely applicable here, where the district court's ultimate conclusion of discriminatory intent came after it heard weeks of testimony and made credibility determinations of multiple decisionmakers central to the design of the challenged districts. *See Cooper*, 137 S. Ct. at 1478 ("A choice to believe 'one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence,' can 'virtually never be clear error.'") (quoting *Anderson*, 470 U.S. at 575).

Ultimately, the mapdrawers themselves acknowledged that creating a separate Cameron County-based district, protecting Representative Farenthold, and respecting the §2 voting rights of Nueces County Latinos was not a zero sum game. *See* Supp. App. 297a. Despite the multitude of options, and consistent with their statewide approach of using race to achieve maximum political gain for Anglo Republicans, mapdrawers chose the one configuration that unnecessarily isolates Nueces County Latinos from an opportunity district and drowns out their electoral power in Anglo-dominated CD27.

B. CD27 Violates § 2's Effects Test

Regardless of the motivation behind CD27, the discriminatory impact on Latino voters in Nueces

County who have been unlawfully deprived of the equal opportunity to elect their candidates of choice persists in CD27. The "approximately 200,000 Hispanic voters in Nueces County (a majority-HCVAP county) [who] had a §2 right that could be remedied but was not" have suffered from the practical effects of vote dilution in every election held this decade. C.J.S. App. 181a.

After examining each of the necessary elements for a §2 violation, the district court found that CD27 "has the effect of diluting Nueces County Hispanic voters' electoral opportunity," C.J.S. App. 190a-91a. Specifically, it found that (1) "a district could be drawn in which Hispanics, including Nueces County Hispanics, are sufficiently numerous and geographically compact to constitute a majority HCVAP"; (2) "racially polarized voting exists such that an Anglo-majority would usually defeat" the Latino-preferred candidate; and (3) "[a] searching practical evaluation of 'past and present reality' and a functional view of the political processes indicates that the political processes are not equally open to Hispanics." *Id.* 190a.

The State does not dispute that the discriminatory effects of CD27 "may be carried over . . . from one version of a law to another." Br. 31-32. It argues only that Plan C235's incorporation of seven Latino opportunity districts in south/west Texas satisfies the first prong of the *Gingles* test and therefore forecloses a §2 claim. Br. 49-50. To be sure, Appellants, Appellees, and the district court all agree that §2 requires seven Latino opportunity districts in the area. *See* C.J.S. App. 112a. But that conclusion is the beginning, not the end, of the §2 inquiry.

The State's argument falters because it fails to account for the invalid racial gerrymander of CD35.

The State itself acknowledges that to establish the effects prong of a vote dilution claim, a plaintiff must prove that there is "'the possibility of creating more than the *existing* number of reasonably compact districts with a sufficiently large minority population to elect candidates of [the minority group's] choice.'" Br. 49 (quoting *LULAC v. Perry*, 548 U.S. at 430) (emphasis added). Once the CD35 constitutional violation is unraveled, removing the Travis County Latinos that were gerrymandered into the district, the "existing number" of Latino opportunity districts falls one short of the undisputed §2 requirement, and a Latino opportunity district still must be established somewhere in the South and West Texas envelope to replace it. This means that Nueces County and its large Latino population must be pulled back into the envelope in order to satisfy the State's §2 obligation. *See* Supp. App. 300a ("Including the population of Nueces County in the envelope makes it easier to draw seven Latino opportunity districts under §2 without including Travis County.").

This is the very thing the Legislature chose not to do when it designed CDs 27 and 35. It took Nueces County Latinos who had a §2 right and put them in an Anglo-dominated district where their rights could not be exercised. In exchange, mapdrawers carved up Travis County racially, placing nearly 150,000 Travis County Latinos in CD35, even though they did not have a §2 right. In short, it engineered a trade that took §2 rights from those who have them to provide a §2 remedy to those who do not. *LULAC v. Perry* holds that such a trade is itself a §2 violation.

> The Court has rejected the premise that a State can always make up for the less-than-equal opportunity of some individuals by

> providing greater opportunity to others. . . . [T]hese conflicting concerns are resolved by allowing the State to use one majority-minority district to compensate for the absence of another only when the racial group in each area had a §2 right and both could not be accommodated.

548 U.S. at 429. "Simply put, the State's creation of an opportunity district for those without a §2 right offers no excuse for its failure to provide an opportunity district for those with a §2 right." C.J.S. App. 181a (quoting *LULAC v. Perry*, 548 U.S. at 430).

The State offers little in response to the obvious parallels to *LULAC v. Perry*. According to the State, because the trade in *LULAC v. Perry* was deemed unlawful for the new district's failure to comply with the first *Gingles* prong, it has no bearing here, where the district court found the new district (CD35) failed to comply with the third *Gingles* prong. Br. 50. This is a distinction without a difference. This Court's holding in *LULAC v. Perry* rests not on the presence or absence of a specific precondition but on the presence or absence of "a §2 right." 548 U.S. at 430; *see also Shaw II*, 517 U.S. at 917 ("The vote-dilution injuries suffered by [individuals with a §2 right] are not remedied by creating a safe majority-[minority] district somewhere else in the State."). Texas's failure to grapple with the basis for the district court's §2 effects ruling is fatal to its appeal of the §2 invalidation of CD27. "Under § 2, the State must be held accountable for the *effect* of [its] choices in denying equal opportunity to Latino voters." *LULAC v. Perry*, 548 U.S. at 441-42 (emphasis added).

CONCLUSION

For the foregoing reasons, as well as the reasons provided by the district court, this Court should either dismiss this case for lack of jurisdiction or, alternatively, affirm the Order on Plan C235 entered by the district court on August 15, 2017.

Respectfully submitted,

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